2001

State of Utah v. Andrew Owens Mallery : Brief of Appellee

Utah Court of Appeals

Richard P. Mauro; Attorneys for Appellant.
Kenneth A. Bronston; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Byron Fred Burmester; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 20010555-CA
v.	:	
ANDREW OWENS MALLERY,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - - -

APPEAL FROM A FINAL JUDGMENT OF CONVICTION FOR AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE TIMOTHY R. HANSON, PRESIDING

KENNETH A. BRONSTON (4470)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Heber M. Wells Building
160 East 300 South, 6th Fl.
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-1080

RICHARD P. MAURO
43 East 400 South
Salt Lake City, Utah 84111

Attorneys for Appellant

BYRON FRED BURMESTER
Deputy Salt Lake District Attorney

Attorneys for Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 20010555-CA
v.	:	
ANDREW OWENS MALLERY,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - - -

APPEAL FROM A FINAL JUDGMENT OF CONVICTION FOR AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE TIMOTHY R. HANSON, PRESIDING

KENNETH A. BRONSTON (4470)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Heber M. Wells Building
160 East 300 South, 6th Fl.
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-1080

BYRON FRED BURMESTER
Deputy Salt Lake District Attorney

Attorneys for Appellee

RICHARD P. MAURO
43 East 400 South
Salt Lake City, Utah 84111

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER WORKS CITED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 20010555-CA
v.	:	
ANDREW OWENS MALLERY,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a final judgment of conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), in the Third Judicial District Court in and for Salt Lake County, the Honorable Timothy R. Hanson, presiding. This Court has jurisdiction of this case under Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2001).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Whether the trial court correctly determined that defendant's stop and detention was based on reasonable suspicion and probable cause and whether his consent to search his pocket was voluntary?

A trial court's determination of whether an investigative stop was supported by reasonable suspicion, whether a particular set of facts constitutes probable cause, and whether a consent to search was voluntarily obtained, is reviewed nondeferentially for correctness, affording a measure of discretion to the trial court. *State v. Pena*, 869 P.2d 932,

939 (Utah 1994) (reasonable suspicion); *State v. Wright*, 1999 UT App 86, ¶6, 977 P.2d 505 (probable cause); *State v. Harmon*, 910 P.2d 1196, 1199 (Utah 1995) (voluntariness of consent). The trial court's findings of fact underlying its denial of a motion to suppress are reviewed for clear error. *State v. Humphrey*, 937 P.2d 137, 140-41 (Utah App. 1997).

2. Whether the trial court correctly determined that the eyewitness's identification of defendant as the driver of the getaway car was constitutionally reliable?

The trial court's decision to admit eyewitness identification evidence is a mixed question of fact and law. The trial court's factual findings are viewed in the light most favorable to the court's decision to admit the evidence and will be reversed "only if they are against the clear weight of the evidence." *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991). The Court reviews for correctness the trial court's conclusion that the eyewitness identification evidence is reliable. *Id.*

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following determinative constitutional provisions and statutes are determinative of this case:

Fourth Amendment to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendant was charged with one count of aggravated robbery, a first degree felony (R. 5). Defendant filed pre-trial motions to suppress evidence seized from defendant and to suppress a positive identification of defendant by the victim shortly after the robbery (R. 56-63). After a hearing on the issues, the trial judge denied those motions (Minute Entry ruling, R. 159-164, attached at Addendum A). Defendant was convicted by a jury and sentenced by the court to six years to life in prison, which included a one-year firearm enhancement (R. 216, 254-5). Defendant timely appealed to the Utah Supreme Court (R. 262). The Utah Supreme Court transferred the case to this Court (R. 268).

STATEMENT OF THE FACTS[1]

The Robbery

Just before 2:00 a.m., on August 18, 2000, Steve Lund was nearing the end of his regular shift as a bellman at the Embassy Suites Hotel (R. 272:65, 68). He had driven the hotel shuttle van to the Ute Car Wash at 300 South and 300 East in Salt Lake City to clean the van (R. 272:65-66). As he was vacuuming the inside of the van, two men approached him from behind (R. 272:66). Lund turned around and saw the men standing side by side approximately five feet from him (R. 272:66). One of the men pointed a gun at Lund, and the other demanded Lund's money (R. 66-67). The man who pointed the gun wore a red baseball cap and a blue sweatshirt, the other had a tan shirt on (R. 272:66). Lund complied

[1] The facts are recited in a light most favorable to the trial court's findings from the suppression hearing. *State v. Delaney*, 869 P.2d 4, 5 (Utah App. 1994).

and gave them his money (R. 272:67). Unsatisfied, one of the men also demanded Lund's wallet, which Lund handed over (R. 272:67). The men departed north on foot leaving Lund standing empty-handed by his van (R. 272:68). The entire encounter lasted from ten to fifteen seconds (R. 272:67).

The robbery occurred directly underneath an overhead light illuminating the vacuuming station, and Lund described the lighting as "pretty good" (R. 272:67). Lund had a clear view of both robbers, and he focused on their faces, neither of which was masked (R. 272:67-68). His senses were unimpaired by alcohol or drugs (R. 272:67-68). Lund reported that since his regular shift at the Embassy Suites was from 5:00 p.m. until 2:00 a.m., and he had, as usual, only been awake since noon the previous day, he was not at all drowsy or unperceptive (R. 272:68-69).

Within a moment after the robbers departed, Lund used the van's two-way radio to contact the hotel personnel and inform them that he had been mugged (R. 272:69). The hotel immediately contacted the police, and when Lund arrived at the hotel five minutes later, he spoke to the police dispatcher (R. 272:69). He described the robbers as two Hispanic males, eighteen and twenty years of age, one with a gun and a baseball cap, and the other in a dark sweatshirt (R. 272:9-10, 77-79).

The Dispatch

Police dispatcher Angie Renteria was on duty at 2:00 a.m. on August 18, 2000, in the Public Safety Building on 315 East and 200 South (R. 272:5). She overheard the call from

the Embassy Suites regarding the robbery. The call recited a limited description of the robbers, that the robber who handled the gun wore a baseball cap and dark clothing and the other robber wore a blue shirt, and that the robbers were last seen walking northward from the crime scene (R. 272:6-7, 9-10). The car wash where the robbery occurred was only one block south of the Public Safety Building, so Renteria looked out the window of the dispatcher's office to see if the robbers were in view. She saw two men, who appeared to be Hispanic, leave an apartment complex on 300 East "just down a bit" from the Public Safety Building and get into a Ute cab (R. 272:6-7). Another dispatcher contacted the Ute Cab Company and obtained the cab number and destination of the cab that stopped at the 300 East apartment complex (R. 272:7). The cab company also stated that the cab had picked up two Hispanic males (R. 272:14).

Officer Mike Hamideh was in his patrol car in the Public Safety Building parking lot at 2:00 a.m. doing paperwork before going off-duty (R. 272:41-2). He heard the dispatch about the armed robbery and the description of the robbers, and he responded to the call, driving to the scene to look for suspects (R. 272:43). At the same time, Officer Jeffrey Carter heard the same dispatch that two male Hispanics, both eighteen to twenty years old and about 5'10", one with a gun and wearing a baseball cap and the other wearing a blue sweatshirt, were walking north from the car wash (R. 272:17-18, 29, 31). Together, the two officers briefly stopped two male pedestrians in the area of the robbery, but quickly released them upon determining "they weren't much of a match" (R. 272:18, 49). The officers then

received a call that two Hispanic males had been picked up by Ute cab number forty-two at an apartment located at 228 South 300 East, near the scene of the robbery (R. 272:7-8, 14, 18, 27-28, 43). The officers also heard that the cab was going to 700 North Redwood Road, and they intercepted the cab at State Street, traveling west on North Temple (R. 272:18-19, 42-43). After confirming the cab number with the dispatcher, Officers Hamideh and Carter activated the overhead lights on their marked patrol cars and stopped cab number forty -two (R. 272:19, 42-43).

The Stop

The cab complied with the signal to stop, and the officers exited their vehicles and approached the cab from the rear (R. 272:20, 44). Although Officer Carter did not employ as intense security measures as in a normal felony stop, he did draw his sidearm, but Officer Hamideh did not. Officer Hamideh called out to the two passengers in the cab that the officers considered them armed and dangerous and directed them to place their hands in view (R. 272:20, 34, 44, 51). Officer Hamideh opened the left rear passenger door of the cab and instructed defendant to exit the vehicle with his fingers laced behind his head (R. 272:44). Officer Carter removed the other suspect, Jesus Israel Rosillo, frisked him, but found no weapon, and then handcuffed him (R. 272:21, 34-35). At the evidentiary hearing Officer Hamideh identified defendant as the person he removed from the cab (R. 272:44). He also testified that although defendant appeared Caucasian, defendant otherwise matched the dispatched description of one of the suspects (R. 272:44, 49-50, 52).

Officer Hamideh performed a protective frisk for weapons on defendant (R. 272:44-45). He did not find any weapons; however, he felt a rectangular object "like a wallet or something like an ID card" in defendant's right rear pocket, but did not remove it (R. 272:45). Officer Hamideh advised defendant that he matched the description of an armed robbery suspect and handcuffed defendant for officer safety (R. 272:45). Officer Hamideh walked defendant toward the rear of his patrol car and asked defendant his name (R. 272:45). Defendant replied that his name was Andrew Mallery (R. 272:45). Officer Hamideh then asked defendant if he had any photo identification, and defendant replied that he did not (R. 272:45-46). Recalling the rectangular object he earlier felt in defendant's rear pocket, Officer Hamideh asked defendant what was in his right rear pocket (R. 272:46). Defendant replied that it was his wallet (R. 272:46). Officer Hamideh said, "Mind if I take that out?" (R. 272:46). Defendant replied, "No" (R. 272:46). Officer Hamideh then asked a clarifying question, "No, I can't take it out?" to which defendant replied, "Oh, okay, take it out" (R. 272:46). Officer Hamideh then removed the wallet from defendant's pocket and found that it contained a stack of closely packed cards, cash, and a Utah driver's license bearing the name Steven Lund (R. 272:46). Officer Hamideh confirmed with the dispatcher that the name of the victim was Steven Lund (R. 272: 47). Defendant then spontaneously declared, "I found the wallet" (R. 272:47).

The Show Up

At the time of the stop, Lund was still at the hotel with an Officer Hawk, who told

Lund that two suspects had been detained and that the police wanted Lund to look at them (R. 272:71). Officer Drake transported Lund from the Embassy Suites to State Street and North Temple, where the cab had been stopped, a trip of less than five minutes (R. 272:69-70). During the drive from the hotel to scene of the detention, Lund heard over Officer Hawk's police radio that the police had found Lund's driver's license on one of the suspects (R. 272:80). When he arrived at the scene of the detention, Lund saw the two suspects in handcuffs on the sidewalk flanked by four or five police officers and about as many patrol cars (R. 272:38-39, 70). One of the suspects wore a red baseball cap (R. 272:79). Officer Hawk parked his patrol car approximately 30 to 40 feet away from the suspects and shined his spotlight on them (R. 272:71-72). Without exiting the vehicle or waiting for any instructions from Officer Hawk, Lund immediately stated, "That's them" (R. 272:71). Lund then told Officer Hawk that defendant had held the gun and that Rosillo had demanded his money and wallet (R. 272: 72-73). Lund acknowledged that at the preliminary hearing that defendant was a Caucasian (R. 272:81). Nevertheless, Lund was certain of this identification and identified defendant again in a line-up at the county jail and a third time at the evidentiary hearing (R. 272:73-74).

Defendant filed a pre-trial motion to suppress the evidence found on defendant's person during the detention on North Temple (R. 59-64). He argued that the police had neither reasonable suspicion nor probable cause to stop and frisk him and that his consent to search his pocket was involuntary (R. 61-62). Defendant also filed a pre-trial motion to

suppress Lund's identification of Mallery on the ground that the "initial identification procedure gave rise to a substantial likelihood of irreparable misidentification" and that the initial identification tainted subsequent identifications (R. 56). After a hearing on the issues, the trial court denied these motions finding that (1) the officers had an articulable suspicion to stop the cab and probable cause to believe defendant was involved in the robbery, (2) defendant was reasonably detained for the few minutes required to transport the victim to identify the suspects, (3) defendant voluntarily consented to the search of his pocket, and (4) the victim's eyewitness identification was proper and that there was no inappropriate suggestion by police officers (R. 159-164).

SUMMARY OF ARGUMENT

POINT I

Defendant's stop and subsequent detention was justified by reasonable suspicion that he was involved in the armed robbery, based on reliable reports from police dispatchers who collectively received information directly from the victim and who actually witnessed defendant and his accomplice leaving an apartment close to and very shortly after the crime. The investigative detention, during which the officer frisked and then handcuffed defendant, was justified by reasonable suspicion that defendant had participated in an armed robbery only moments before, and therefore might be armed and dangerous. Also, the officers diligently pursued their investigation by detaining defendant only a few minutes so that the victim could be transported for a possible identification. When the victim positively

identified defendant as one of the robbers, the officer had independent probable cause to arrest him and then search him incident to that arrest.

Even if the officers' conduct in detaining defendant and his companion expanded the scope of the detention to the point of arrest, the arrest was supported by probable cause when the officers discovered that defendant and his companion substantially matched the description of the robbers. Consequently, both the victim's identification of defendant at the site of his apprehension and independent probable cause to arrest justified the officer's searching defendant's person i. Moreover, defendant voluntarily consented to the officer's removing his wallet, at which point the officer discovered that defendant possessed the victim's driver's license.

POINT II

The victim's identification of defendant as the armed robber was constitutionally reliable. The only compromising factor was the victim's discovery prior to the identification that defendant had been found with his driver's license. Although suggestive, this factor does not outweigh the patent reliability of the identification. The victim was not impaired and plainly attentive to the event, and the identification was made in favorable viewing circumstances, was made spontaneously, and remained consistent throughout the proceedings. The circumstances of the identification were, in short, altogether more favorable than in *State v. Ramirez*, 817 P.2d 774 (Utah 1991).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED BY A VALID SEARCH OF DEFENDANT INCIDENT TO ARREST AND DEFENDANT'S VOLUNTARY CONSENT

Defendant contends that the investigating officers detained and frisked him without either reasonable suspicion or probable cause to believe that he was involved in the armed robbery or was armed and dangerous, thereby coercing his consent to search his pocket by exploiting the alleged violations of his Fourth Amendment rights. Aplt. Br. at 17-25.

Contrary to his claim, defendant's stop and subsequent detention was justified by reasonable suspicion that he was involved in the robbery. Further, the investigative detention did not become an arrest merely because the officers approached defendant with guns drawn and then frisked and handcuffed him. Given the circumstances of the offense, the officers had ample reason to take reasonable measures to protect themselves. Also, they diligently pursued a means of investigation likely to confirm or dispel their suspicions by detaining defendant only a few minutes so that the victim could be transported for a possible identification. Even if the detention amounted to an arrest, the arrest was justified by probable cause, which in turn justified a search incident to the arrest. In any event, defendant's consent to the search was voluntary.

A. The officers had reasonable suspicion to believe that the occupants of the cab had committed an armed robbery.

"A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions." Utah Code Ann. § 77-7-15. This court has defined reasonable suspicion as requiring that there exist "specific, articulable facts which together with rational inferences drawn from those facts, would lead a reasonable person to conclude [that the suspect] had committed or was about to commit a crime." *State v. Trujillo*, 739 P.2d 85, 88 (Utah App. 1987).

When an officer does not observe firsthand the facts and events creating reasonable suspicion, he may rely on information relayed from another officer or a dispatcher. *State v. Bruce*, 779 P.2d 646, 650 (Utah 1989) (finding that an officer was justified in stopping vehicle thought to contain armed robbery suspects based on information from dispatch). Under such conditions, the reasonable suspicion analysis is shifted from the officer making the stop to the dispatcher or officer issuing the bulletin. *Kaysville v. Mulcahy*, 943 P.2d 231, 234 (Utah App. 1997); *United States v. Hensley*, 469 U.S. 221, 232-33 (1985). This court has determined that the three-factor *Mulcahy* analysis is appropriate for assessing whether a dispatcher's report is sufficiently reliable to support "reasonable articulable suspicion." *State v. Valenzuela*, 2001 UT App 332 ¶ 14, 37 P.3d 260. In *Valenzuela*, this Court succinctly set out the *Mulcahy* analysis for assessing whether a dispatcher's report is

sufficiently reliable to support "reasonable articulable suspicion":

> Our first focus is upon 'the type of tip or informant involved,'granting identified informants substantially more credibility than anonymous informants. Next we examine 'whether the informant gave enough detail about the observed criminal activity to support a [seizure],' and concluded that '[a] tip is more reliable if it is apparent that the informant observed the details personally, instead of relaying information from a third party.' Finally we examine 'whether the police officer's personal observations confirm the dispatcher's report of the informant's tip.'

Valenzuela, 2001 UT App 332, ¶ 15 (quoting *Mulcahy,* 943 P.2d at 235-36) (citations omitted). These three factors are considered together to determine if, under the totality of the circumstances, there exist specific and articulable facts to support reasonable suspicion. *Mulcahy*, 943 P.2d at 234.

In this case, the information broadcast to Officers Hamideh and Carter, that in the very early morning, only moments after an armed robbery, two partially described suspects were traveling in a specifically identified taxi cab from a location proximate to the scene of the crime, provided the officers with reasonable suspicion to stop the cab.

1. The source of the information

The first *Mulcahy* factor is the credibility of the source of the information. *Valenzuela*, 2001 UT App 332, ¶ 15. Courts should grant "identified informants substantially more credibility than anonymous informants." *Mulcahy,* 943 P.2d at 235-36. Where the informant is a victim, veracity may be assumed. *Id.* at 235; *State v. Treadway*, 499 P.2d 846, 848 (Utah 1972) (finding that a citizen who viewed drugs in defendant's motel room is presumed reliable). *See also*, *Chambers v. Maroney*, 399 U.S. 42, 46-47

(1970) (holding that speaking with victim and observers provided police ample cause to stop defendant's vehicle).

All of the informants who supplied the information that was ultimately broadcast in the bulletin were citizen informants. The victim described the armed robbery and his assailants, a dispatcher personally witnessed two males get into a cab near the crime scene, and the cab company confirmed that cab number forty-two had picked up two Hispanics at 228 South 300 East in Salt Lake (R. 272:5-14, 65-67). The victim is presumed reliable under *Treadway* and the police dispatcher and Ute dispatcher are disinterested witnesses who are presumed reliable under *Maroney*.

2. The amount of detail

The second *Mulcahy* factor is "whether the informant gave enough detail about the observed criminal activity to support a [seizure]." *Mulcahy*, 943 P.2d at 236. The level of detail provided by Lund in the present case is similar to that provided by the victim of an armed robbery in *State v. Bruce*, 779 P.2d 646 (Utah 1989). The Utah Supreme Court in *Bruce* upheld the stop of the defendant's vehicle based on reasonable suspicion. In *Bruce*, a convenience store clerk received a phone call from a man claiming to have a gun trained on her. *Id.* at 647. The unidentified caller instructed the clerk to place all the money in her register into a bag and to give it to a man who would soon be entering the store. *Id.* Within a few minutes a young man did enter the store and told the clerk to comply with the man on the phone. *Id.* The clerk gave the young man the money from her register, and the young

man fled the store. *Id.* The clerk's sister, also in the store, followed the robber at a safe distance and observed him entering a walkway between two apartments. *Id.* at 648. Minutes later, the sister saw an orange Datsun station wagon leave the apartment building parking lot. *Id.* The sister did not see the occupants of the station wagon. *Id.* The clerk contacted the police and gave an account of the robbery and a description of the robber as a black male approximately five feet seven inches in height, wearing dark corduroy pants, a dark sweat jacket with white lines, and a ski cap. *Id.* The clerk's sister described the apartments and the car and also stated that she lived at the apartment complex where the orange station wagon was sighted and that she did not recognize the car as belonging to any resident of the complex. *Id.*

The police dispatcher notified local police units of the robbery and erroneously broadcast that the station wagon contained two black males suspected of the robbery. *Id.* An orange station wagon was sighted and stopped, and the defendants, two black males, were discovered therein. *Id.* Police detained the defendants until the victims arrived and identified them, at which point the defendants were arrested and charged with armed robbery. *Id.*

The defendants moved to suppress the victims' identification claiming that the victims' information was insufficient to place the robber of the store in the orange car, and, therefore, the subsequent stop of the defendant's car was not supported by reasonable suspicion. *Id.* at 649. The trial court denied the motion. *Id.* In upholding the trial court's

decision, the Utah Supreme court declared that "[w]hile the police officer who issued the broadcast may have improperly placed two black males in the front seat of the orange car, other sufficient information was provided and 'articulable facts' existed to support at least a 'reasonable suspicion' that the robber of the store was in the orange car." *Id.* at 650-651. As the dispatcher did not have a description of the driver of the orange station wagon, the "other sufficient information" cited by the court could only include that the robber fled in the direction of the apartments, that the apartments were near the crime scene, that orange car left a place near the crime scene soon after the robbery, and that the orange car was out of place in the apartment parking lot.

In this case, the description given to dispatch by Lund was at least as detailed as that provided by the victim in *Bruce*. The description Lund provided contained the same elements as the victim in *Bruce*, that is, defendant's gender, race, height, and clothing (R. 272:9-10). Lund also estimated the approximate ages of the robbers (R. 272:9-10). The court in *Bruce* relied on mere proximity to the crime scene and to the culprit's direction of flight to link defendant's car to the robbery and establish reasonable suspicion to stop defendant's car. Ms. Renteria, the dispatcher in this case, confirmed with the cab company that the cab had picked up two Hispanics shortly after and near the robbery, and she obtained the number and destination of the cab from the cab company, thus ensuring that officers located and stopped the correct cab (R. 272:7-14).

Defendant argues that the description "two male Hispanics" coupled with proximity

to the crime scene does not create reasonable suspicion, especially where one of the cab passengers is Caucasian. Aplt. Br. at 21. In support, defendant cites several cases. However, as a fuller description of each case than provided by defendant makes evident, reasonable suspicion was found lacking because either the officers had no evidence that a crime had been or was about to be committed or the officers had no evidence linking the suspect to the crime.[2]

In contradistinction to cases cited by defendant, Officers Hamideh and Carter received the following specific information linking defendant with the robbery: (1) an armed robbery had been committed at 300 South and 300 East at about 2:00 am and that robbers had walked northward from the scene of the crime (R. 272:17-18,41-43); (2) the robbers were two male Hispanics, both about 5'10" and eighteen to twenty years old, one with a gun

---

[2] Defendant cites the following cases finding no reasonable suspicion: *State v. Trujillo*, 739 P.2d 85, 89 (Utah App. 1987) (finding no reasonable suspicion existed to justify stop of trio of men at 3:30 a.m. in high crime area, when officer had received no reports of crime in the area and trio's activity was consistent with innocent as well as criminal behavior); *State v. Swanigan*, 699 P.2d 718, 719 (Utah 1985) (finding no reasonable suspicion existed to justify stop of two men walking three blocks from burglary at 1:40 a.m., when officers had no knowledge whether men had been at scene of crime and officers had not observed any unlawful or suspicious behavior); *State v. Carpena*, 714 P.2d 674, 675 (Utah 1986) (*per curiam*) (holding that slowly moving vehicle, with out-of-state plates, in neighborhood in which a number of burglaries had occured, without more, is insufficient to support reasonable suspicion to justify detention of the occupants thereof); *Brown v. Texas*, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct"). Aplt. Br. at 21-22.

wearing a baseball cap and the other wearing a blue sweatshirt (R. 272:17-18, 29, 31); and (3) less than twenty minutes after the robbery, suspects matching the description of the two robbers were picked up from an apartment located at 228 South and 300 East, less than one block from the crime scene, by Ute cab, number 42 (R. 272:7-8, 14, 18, 27-28, 43). In sum, the officers had a reasonably detailed description of two robbers, at least one of whom was armed, who had just committed an armed robbery and who, within moments, left a location close to the scene of the crime in an identified vehicle, more than ample information to support reasonable suspicion to stop Ute cab number 42. See *Bruce*, 779 P.2d at 650-51 (finding reasonable suspicion only on proximity to perpetrator's direction of flight and to the crime scene, without suspect's physical description).

3. The police officers' personal observations

The third *Mulcahy* factor is "whether the police officer's personal observations confirm the dispatcher's report of the informant's tip." *Mulcahy*, 943 P.2d at 236. Officers may confirm the report either by observing the illegal activity or by finding the person or vehicle substantially as described by the informant. *Id.* In *Mulcahy*, this Court found this factor satisfied by the officer's discovering a matching vehicle, only moments after the informant's report, traveling in the reported direction. *Id.* at 237-38.

The officers' personal observations were essentially the same as in *Mulcahy*. The officers learned from dispatch that Ute cab number 42 was reportedly heading to 700 North Redwood Road (R. 272:18). The officers found Ute cab number 42 traveling west on North

Temple, in the direction of Redwood Road, as indicated by the dispatcher (R. 272:18-19, 43). As a further precaution, the officers confirmed the cab number with dispatch before stopping it (R. 272:19, 43).

In sum, the investigating officers received from reliable sources information which they confirmed and established reasonable suspicion that defendant was involved in the robbery.

B. Because the officer diligently pursued a means of investigation likely to confirm or dispel his suspicion that defendant was involved in the robbery, the stop did not become an arrest requiring probable cause.

Defendant claims that as soon as the officers' drew at least one of their sidearms while ordering him and Rosillo from the cab, and then frisked and handcuffed them, the stop immediately became an arrest, requiring probable cause. Aplt. Br. at 20. In support, defendant argues that the police lacked reasonable suspicion to frisk him and that Officer Hamideh's "demand" to know what was in his pocket constituted a search requiring proof of both probable cause, which was lacking, and exigent circumstances. Aplt. Br. at 20-21, 23. These claims are meritless.

"Once a traffic stop is made, the detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *State v. Hansen*, 2000 UT App 353, ¶11, 17 P.3d 1135 (quoting *State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994)) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325 (1983)). Both "the length and scope of the detention must be 'strictly tied to and justified by' the circumstances which

rendered its initiation permissible." *State v. Johnson*, 805 P.2d 761, 763 (Utah 1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 1879 (1968)). "[T]his court has held there is no 'bright-line rule as to the acceptable length of a detention because common sense and ordinary human experience must govern over rigid criteria.'" *State v. Grovier*, 808 P.2d 133, 136 (Utah App. 1991) (citations omitted). The operative rule, therefore, is that "officers must '"diligently [pursue] a means of investigation that [is] likely to confirm or dispel their suspicions quickly, during which time it [is] necessary to detain the defendant."'" *Lopez*, 873 P.2d at 1132 (quoting *State v. Grovier*, 808 P.2d 133, 136 (Utah App. 1991) (first two alterations in original) (quoting *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575(1985) (upholding a 20-minute detention during which the police proceeded expeditiously in confirming their suspicion that defendant was involved in criminal activity)). *See also* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.2(f) at 66 (3d ed. 1996) (noting that "the relative seriousness of the offense being investigated and whether the police are inching closer to having probable cause for arrest" bears on assessment of whether "police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon"). "A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." *Sharpe*, 470 U.S. at 686, 105 S. Ct. at 1575.

1. The circumstances of the offense and the stop justified the officers' reasonable force to detain defendant during the investigatory stop

In the seminal case, *Terry v. Ohio*, the United States Supreme Court held that police officers, for their protection, were authorized to conduct a limited search of persons reasonably believed to be armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 27, 92 S. Ct. 1868, 1883 (1968). *See State v. Rochell*, 850 P.2d 480, 483 (Utah App. 1993) (recognizing authority to "pat down," or "frisk" when "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion") (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). "'The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" *State v. Carter*, 707 P.2d 656, 659 (Utah 1985) (quoting *Terry*, 392 U.S. at 27, 92 S. Ct. at 1883).

Moreover, the United States Supreme Court has held that in conducting *Terry* stops, the investigating officers may take steps reasonably necessary to maintain the status quo and to protect their safety including the drawing of weapons. *See United States v. Hensley*, 469 U.S. 221, 235, 105 S. Ct. 675, 683 (1985) (holding that the officers were justified in approaching defendant's vehicle with pistols drawn when suspect was described as "armed and dangerous"). Additionally, courts have consistently concluded that handcuffing suspects may be within the scope of an investigatory stop and does not necessarily amount to an arrest requiring probable cause. *See People v. Erazo*, 682 N.Y.S.2d 26, 26 (N.Y.

App. Div. 1998) (justified in drawing their guns to apprehend both suspiciously acting, gun wielding, armed robbery suspects and holding them in handcuffs); *People v. Bowen*, 240 Cal.Rptr. 466, 469 (Cal. Ct. App. 1987) (fact that appellant was properly securely with handcuffs while detained awaiting the victim's arrival does not mean that appellant was under arrest during this time); *White v. United States*, 763 A.2d 715, 721 (D.C. 2000) (reasonable for police officer, during valid investigatory stop for weapons, to instruct occupants of the defendant's car to step out of the vehicle and to handcuff them before engaging in additional investigation, where car was located at a remote area of police station's impound parking lot, informant feared the car's occupants presented imminent threat, the defendant was a large man and it was two o'clock in the morning). The scope of the intrusion varies with the facts and circumstances of each case. *Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325.

In this case, the officers had reliable information that the occupants of Ute cab number 42 were reasonably suspected of having committed an armed robbery less than one-half hour before the officers intercepted the cab. There were two suspects. It was about 2:20 in the morning, a time when Salt Lake City streets are almost deserted (R. 272:17-18, 27-28, 41-43). Defendant and Rosillo complied with the officers' requests to display their hands and exit the cab (R. 272:34, 51). Officer Carter did not consider Rosillo, who was being detained in the same way as defendant, to be under arrest even though he had been frisked and was handcuffed (R. 272:34). However, in these circumstances, the officers

would still have been reasonably concerned for their safety. Although the victim reported that only one of his assailants held a gun, there was no evidence that both suspects had not been armed (R. 272:18). Moreover, even after defendant and Rosillo were frisked and no weapon was found, there was no assurance that guns were not concealed in the cab. In sum, the stop was classically one in which officers would feel concerned for their safety under *Terry*. Consequently, the officers were warranted in taking the protective measures used in this case as part of the investigatory stop, without first needing probable cause to believe that defendant had been involved in the robbery.

2. The officer's mere request to see defendant's wallet was not a "search" requiring probable cause

In support of his claim that the officers' conduct immediately elevated a stop into an arrest requiring probable cause, defendant further argues that Officer Hamideh's "demand" to know what was in his pocket constituted a search requiring proof of both probable cause and exigent circumstances. Aplt. Br. at 20-21. The argument mischaracterizes the encounter and misconstrues the law. First, as more fully discussed below in the State's response to defendant's claim that his consent was involuntary, *see* Aple. Br. at Point I.D, Officer Hamideh did not "demand" that defendant show the contents of his pocket. Rather, as the trial court recognized, Officer Hamideh first asked to see defendant's wallet, then clarified defendant's ambiguous response, and finally reached into defendant's pocket only when defendant unambiguously consented (R. 160; 272:46). Thus, the record does not support that the officer used such force that it might arguably be considered a "search."

Second, a mere request to see defendant's identification is patently not a "search," and defendant has cited no authority to the contrary. Contrary to defendant's argument, *see* Aplt. Br. at 21, the court in *State v. Whittenback*, 621 P.2d 103 (Utah 1980), simply found that probable cause justified a search of the defendant's pockets, without determining that the officer's request, *per se*, was a search. *Id.* at 106-07.

Finally, asking for the identification of a suspect, reasonably detained on suspicion of criminal activity, is preeminently a feature of a straightforward criminal investigation which has not yet become an arrest requiring probable cause. In *Adams v. Williams*, a case in which the an officer was held to have reasonably reached into the suspect's car to retrieve a gun based on an informant's tip in a level two stop, the United States Supreme Court made explicit what it had left implicit in *Terry:* "A brief stop of a suspicious individual, *in order to determine his identity* or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (citing *Terry*, 392 U.S. at 23, 88 S. Ct. at 1881) (emphasis added). *See also Moore v. State*, 55 S.W.3d 652, 655 (Tex. Crim. App. 2001) ("An investigative detention is a temporary and narrowly tailored investigation directed at determining a person's identity or maintaining the status quo while officers obtain more information.") (citation omitted).

3. The officers diligently pursued a means of investigation to confirm or dispel their suspicion that defendant was involved in the robbery by detaining him only for the brief period to transport the victim to the site of apprehension for a possible idendification

Upon the general principles governing the scope of investigatory stops set out above, and in circumstances comparable to this case, courts have uniformly upheld detentions extended for a brief time for the transport of witnesses to confirm or dispel suspicions concerning a suspect's identity as the perpetrator of an offense. *See Erazo*, 682 N.Y.S.2d at 26 (officers justified in handcuffing armed robbery suspects until the robbery witnesses could be brought to the scene of the apprehension, where defendant was independently identified by the two victims within 15 minutes of the crime) *United States v. Dickson*, 58 F.3d 1258, 1263 (8th Cir. 1995) (15-minute detention of defendant pending arrival of witnesses was quickest means of investigation reasonably available to confirm the officer's suspicions and did not transform investigative stop into arrest), *cert. denied*, 516 U.S. 1064, 116 S. Ct. 747 (1996); *State v. Buti*, 964 P.2d 660, 664 (Id. 1998) (prompt summoning of victim to "showup" to identify burglary suspects was reasonably and diligent action to quickly confirm or dispel lone officer's suspicions and did not convert hour-long wait into an arrest); *State v. Wilkens*, 465 N.W.2d 206, 210-11 (Wis. Ct. App. 1990) (investigatory detention of defendant for an hour to an hour and 20 minutes did not ripen into illegal arrest while police diligently obtained witness' statement, found victim of sexual assault and robbery, calmed her down, took her statement, and immediately sent her for possible identification of defendant); *People v. Bowen*, 240 Cal. Rptr. 466, 469 (Cal. Ct. App. 1987)

(detention of handcuffed suspect for 25 minutes to wait for transport of purse-snatching victim not unduly prolonged, especially since police vehicle transporting victim became caught in traffic). *Accord State v. Ottesen*, 920 P.2d 183, 185 (Utah App. 1996) (upholding extended detention of driver stopped on suspicion of driving under the influence of alcohol for five to ten minutes to allow for arrival of backup officer to perform field sobriety test).

In this case, the trial court concluded that "the officers had at least an articulable suspicion regarding the occupants of the cab as being involved in the robbery which they were investigating," to justify the initial stop (R. 160). At the evidentiary hearing, the court reflected on whether reasonable suspicion that a defendant committed a serious crime, as in this case, justified a more extended detention than for a routine traffic stop, to allow the victim sufficient time to arrive and view the suspect (R. 272:111-13). The court resolved the matter in its written decision: "[T]aking into account the nature of the crime being investigated," the manner of defendant's continued detention, including its length, "was reasonable to effect the purpose of the stop and . . . was appropriate" (R. 161-62). The court's conclusions are well founded in law.

On appeal, defendant challenges the trial court's conclusion as to defendant's continued detention once the police discovered he was not Hispanic and was wearing a dark baseball cap. Aplt. Br. at 22. However, as discussed above, police had at least reasonable suspicion to detain defendant, notwithstanding that the officers also discovered a contradictory fact. *See Commonwealth v. Ellis*, 662 A.2d 1043, 1048 (Pa. 1995) (rejecting

African-American defendant's challenge to stop based on matching description of vehicle that was seen at crime and was only car in vicinity, although suspect was described as white or "Mexican").

More importantly, defendant fails to challenge the trial court's finding that "[t]he officers detained the defendant and co-suspect, Rosillo, near the location of the stop to see if they could be identified by the victim, . . . [t]he victim was close, and the detention would be of short duration" (R. 162). Defendant also fails to challenge the court's conclusion that "such a procedure [was] proper" (R. 162). The record supports the court's findings and conclusion - - Lund was summoned from the Embassy Suites almost immediately after defendant and Rosillo were apprehended, and he arrived at the showup within five minutes (R. 272:69-70). In the circumstances of the stop, that defendant and Rosillo were reasonably suspected of committing an armed robbery only moments before, Officers Carter and Hamideh "diligently [pursue] a means of investigation that [is] likely to confirm or dispel their suspicions quickly." *Sharpe*, 470 U.S. at 686, 105 S. Ct. at 1575.

In sum, defendant has failed to show that the trial court improperly concluded that the stop was reasonably extended for the brief period for Lund to appear and provide a possible identification.[3] In any case, even if the officers' conduct in detaining defendant

---

[3] Implicit in the trial court's conclusion that defendant was properly detained until Lund positively identified him as one of the robbers, is that the positive identification of defendant as one of the robbers provided probable cause to arrest defendant. *See State v. Rivera*, 954 P.2d 225, 228 (Utah App. 1998) (finding witness's reliable showup identification of defendant was admissible to show probable cause). *Accord State v.*

until Lund arrived went beyond the permissible limits of an investigatory stop, their conduct was justified upon their immediate discovery of facts providing probable cause to arrest defendant, i.e., that defendant and Rosillo matched Lund's descriptions of the robbers.

C. Reasonable suspicion immediately ripened into probable cause to arrest when officers discovered that the occupants of the cab matched the victim's descriptions of the robbers, thus supporting a search incident to arrest.

"A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person: . . . (2) when he has reasonable cause to believe a felony or class A misdemeanor has been committed and has reasonable cause to believe the person arrested has committed it." Utah Code Ann. § 77-7-2(2). There must be a fair or "'substantial probability that a crime has been committed and that a specific individual committed the

---

McArthur, 2000 UT App. 23, ¶33, 996 P.2d 555 (finding witness's positive identification of unique items reported stolen "could not fail to support probable cause"); *State v. Womack*, 967 P.2d 536, 541 (Utah App. 1997) ("determining probable cause based on current circumstances exists '[w]hen the affidavit shows that an identified individual [] anticipates receiving [ ] specific contraband through the mail at a particular location'") (citation omitted). Moreover, probable cause that defendant was one of the robbers supports an arrest and, consequently, a search incident to that arrest. *See State v. Spurgeon*, 904 P.2d 220, 227 (Utah App. 1995) (probable cause to arrest justified search of suspect's person incident to arrest) (citation omitted). Thus, in addition to the trial court's conclusion that the search of defendant's person resulted from his voluntary consent, *see* Aple. Br. at Point I(D), there exists the additional legal ground that the discovery of defendant's wallet was justified incident to defendant's arrest. To the extent this Court may regard this conclusion as an independent, alternative basis for the discovery of defendant's wallet, it is justified. *See State v. Shepherd*, 1999 UT App 305 ¶31 n.4, 989 P.2d 503 (rejecting *Batson* claim on alternative proper ground that the defendant failed to establish a prima facie case) (citing *State v. South*, 924 P.2d 354, 357 (Utah 1996)).

crime.'" *State v. Clark*, 2001 UT 9, ¶ 11 n.1, 20 P.3d 300 (quoting *Taylor v. Meacham*, 82 F.3d 1556, 1562 (10th Cir.1996)). "The quantum of evidence needed for probable cause is significantly less than that needed to prove guilt." *Spurgeon*, 904 P.2d at 226 (quoting *State v. Bartley*, 784 P.2d 1231, 1235 (Utah App. 1989). "Utah appellate courts have observed that 'probable cause does not require more than a rationally based conclusion of probability,' . . . and that probable cause is 'only the probability, and not a prima facie showing, of criminal activity.'" *Id.* (citations omitted). The same factors used in *Mulcahy* to determine reeasonable suspicion are applicable to determine if officers had probable cause to believe that the occupants of the cab in this case had committed an armed robbery and to arrest them. *Valenzuela*, 2001 UT App 332 at ¶16.

1. The source of the information

As with the foregoing discussion on reasonable suspicion, *see* Aple. Br. at Point I.A.1, all the informants providing information to the dispatcher were citizen-informants who personally observed the facts that they relayed to dispatch, and thus fundamentally reliable. *See State v. Deluna*, 2001 UT App 401 ¶ 14, 40 P.3d 1146 (assuming veracity of citizen-informant who witnessed crime in determining probable cause for warrant).

2. The amount of detail

Lund provided a general description of the robbers, and two people matching that description were found leaving the scene of the crime in a cab shortly after the crime occurred (R. 15, 272:9-10). Courts have unanimously agreed that a general description

accompanied by proximity to the time and place of the crime is sufficient give officers probable cause to arrest. *See, e.g.*, *Dunn v. Alaska*, 653 P.2d 1071, 1077-1078 (Alaska App. 1982) (holding that probable cause existed to arrest suspect matching general description of armed robber, a "black male with short Afro and Fatigue jacket," apprehended within twenty minutes of robbery seven blocks from crime scene); *State v. Leslie*, 708 P.2d 719, 723-724 (Ariz. 1985) (finding that probable cause existed to arrest burglary suspect who fit general description, "Mexican looking male wearing dark blue," and who was found near crime scene when crime occurred in sparsely populated area); *Commonwealth v. Brown*, 326 A.2d 906, 218-219 (Pa. Super. 1974) (finding probable cause existed to arrest suspect found one half hour after mid-afternoon robbery near crime scene where suspect matched general description of robber, black male, 5'10" height, 160 pounds, gold rim glasses, full length brown coat); *State v. Burgess*, 716 P.2d 948, 951 (Wash. App. 1986), *rev. denied*, 106 Wash. 2d 1004 (1986) ("Probable cause exists when an officer makes an arrest based on a physical description of the defendant and when the officer finds that the defendant is in close proximity in time and distance to the crime site").

As set out in detail above, *see* Aple. Br. at Point I.A.2, the officers heard dispatches about an armed robbery that had just occurred (R. 272:17-18,41-43); they received a general description of the suspects that included their sex, race, height, age, and description of clothing (R. 272:17-18, 29, 31); they apprehended two men matching the descriptions of the robbers, who were seen leaving the crime scene in a taxi cab twenty minutes after the crime

occurred (R. 272:7-8, 14, 18, 27-28, 43); and they stopped the cab which undisputedly was the one in which the suspected robbers were traveling (R. 272:18-19, 43). The trial court that this information provided the officers with probable cause to arrest defendant (R. 161). A finding of probable cause is further supported by the time of the robbery. At three o'clock in the morning few people are on the streets or even awake. The record indicates that, although a bulletin had been dispatched to all units in the area, the police only stopped one other pair who were immediately released because they were not Hispanic (R. 272:18, 49).

3. The police officer's personal observations

When Officer Hamideh removed defendant from the car he observed defendant matched the description in all of the particulars transmitted to him (R. 272:44, 49-50, 52). Additionally, the trial court correctly found, based on Lund's identification of defendant at the showup, that defendant was wearing a baseball cap, a detail reported by Lund and received by the officers from dispatch (R. 161; 272:18, 66, 79). Further, the trial court found that "co-defendant Rosillo matched the description given by the victim," a fact the officers would have observed and which is not challenged on appeal (R. 161).

Defendant argues that the officers should have released him as soon as he got out of the cab because he did not fit the description given by the victim. Aplt. Br. at 22. Specifically, defendant claims that he is Caucasian, not Hispanic, and that he was wearing a red baseball cap, not a dark baseball cap. Aplt. Br. at 22. These discrepancies are not significant on the facts of this case. First, probable cause, which requires "only the

probability, and not a prima facie showing, of criminal activity," *Spurgeon*, 904 P.2d at 226, does not disintegrate in the face of some discrepancies in otherwise substantially matching physical descriptions of the suspect. *Cf. United States v. Hummer*, 916 F.2d 186, 190 (4th Cir. 1990) (probable cause for arrest where the defendant made suspicious statements, wore clothing similar to that of person observed fleeing from agents, and suddenly veered away upon observing agent), *cert. denied*, 499 U.S. 970, 111 S. Ct. 1608 (1991); *Hawkins v. State*, 660 S.W.2d 65, 70 (Tex. Crim. App. 1983) (probable cause to arrest where officer stopped the defendant based on similarities in appearance of defendant and his car to witnesses' description), *cert denied*, 506 U.S. 1089, 113 S. Ct. 1137 (1993).

More importantly, the alleged discrepancies in this case are either trivial or nonexistent. Regarding the baseball cap, Lund reported that one of the robbers wore a "red" baseball cap (R. 272:66). The officers' variously heard from dispatch that one of the suspects was wearing a "baseball cap" or a "dark" baseball cap (R. 272:18, 50). Plainly, a red baseball cap may be "dark" in color or may appear so by artificial light in the middle of the night. As to defendant's ethnicity, the witnesses acknowledged at the suppression hearing that defendant appeared to be Caucasian or not Hispanic (R. 272:25, 52, 81). However, at trial, Officer Hamideh, who is Hispanic, clarified his suppression hearing testimony. Officer Hamideh testified that defendant was "not as tan" at trial as he was the day he was arrested and that based on the officer's background and defendant's appearance, defendant had "a Hispanic appearance" at the time he was apprehended (R. 274:244-49).

In fact, defendant may reasonably be taken for a Hispanic. *See* State's Exhibit #3, lineup photograph of defendant taken night of offense, included in State's Exhibit #17.

In sum, based on information already received about the offense and the two suspects, Officer Hamideh had sufficient probable cause to arrest defendant when he and Officer Carter removed defendant and Rosillo from the cab and discovered that they matched the descriptions of the robbers, justifying a search incident to arrest. *Spurgeon*, 904 P.2d at 227. In any event, defendant voluntarily consented to a search of his person.

D. Defendant voluntarily consented to the search of his back pocket.

Warrantless searches "are *per se* unreasonable under the Fourth Amendment–subject only to a few specifically established and well-delineated exceptions." *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); U.S. Const. amend. IV). One such exception is a search performed pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). When the State justifies a warrantless search on the basis of consent, "the Fourth and Fourteenth amendments require that [the State] demonstrate that the consent was (1) voluntarily given and (2) not the result of duress or coercion, express or implied." *Schneckloth,* 412 U.S. at 248 (1973). The Utah Supreme Court has adopted five factors to show a lack of duress or coercion: 1) the absence of a claim of authority; 2) the absence of an exhibition of force by the officers; 3) a mere request to search; 4) cooperation by the owner of the property or item to be searched; and 5) the absence of deception or trick on the part of the officer. *State v. Whittenback*, 621 P.2d

103, 106 (Utah 1980). "Consent given while in custody does not, per se, render the consent involuntary." *State v. Bobo*, 803 P.2d 1268, 1273 (1990). Rather, the *Whittenback* factors are considered together to determine if, under the totality of the circumstances, the consent was voluntary.[4] *Whittenback*, 621 P.2d at 106.

When the *Whittenback* factors are applied to the full circumstances of the consent, it is clear that the consent was voluntary and not the product of duress or coercion. Officer Hamideh asked defendant if he could remove and inspect defendant's wallet by asking, "Mind if I take that out?" (R. 272:46). Defendant replied, "No" (R. 272:46). Officer Hamideh then asked a clarifying question, "No, I can't take it out?" to which defendant replied, "Oh, okay, take it out" (R. 272:46). On these facts, and in light of the totality of the circumstances, the trial court found that defendant's consent to Officer Hamideh's request to see his wallet was voluntary (R. 160). The record supports the trial court's legal conclusion.

1. Claim of authority

Officer Hamideh made no claim of authority to conduct the search, but instead politely requested permission to examine the wallet. When it appeared that there may have been some ambiguity in his first statement, Officer Hamideh asked a clarifying question to make sure that he correctly understood defendant's response and that defendant had, in fact,

---

[4] Defendant has not argued that the State failed to prove that defendant waived his right not be searched, and such a showing is no longer necessary according to *State v. Bisner*, 2001 UT 99, ¶ 47, 37 P.3d 1073. Voluntary consent, not waiver, is the test.

consented to the officer's request (R. 272:46).

2. Show of force

Officer Carter drew his sidearm before removing the co-defendant, Rosillo, from the cab, but Officer Hamideh did not draw his sidearm before removing defendant (R. 272:34, 51). A show of force towards Rosillo is irrelevant to whether defendant's consent was voluntary. *Bisner*, 2001 UT 99, ¶49 ("examination [of *Whittenback* factors] is limited to whether duress or coercion was exerted on the person who consented to search," and concluding that prior show of force directed toward the defendant irrelevant to issue of the defendant's mother's consent). The only action by Officer Hamideh that could arguably be viewed as a show of force is handcuffing defendant. But, "[t]he fact that defendant was immediately handcuffed upon arrest and remained handcuffed . . . does not defeat a conclusion of voluntariness." *Bobo*, 803 P.2d at 1274. "It is but a single element for the trial court to consider." *Id.* Here, it should be given little weight in view of defendant's understanding that he was an armed robbery suspect and was handcuffed for officer safety, not for coercion during an investigatory stop. The officers had not yet found the gun used in the robbery and, therefore, were justified in a believing that the gun could still be on one of the defendants or in the back seat of the cab.

3. Mere request to search

Officer Hamideh only asked, "Mind if I take it out?" A question so phrased is a mere request to search. Officer Hamideh did not command defendant to empty his pockets; rather

he asked defendant *what was in his pocket*. The question contains none of the coercive factors with which *Whittenback* is concerned and was entirely appropriate in the context of an investigatory stop.

4. Cooperation by the owner

Defendant fully cooperated with Officer Hamideh as shown in their dialog. While defendant's first answer, "No," arguably might have indicated a refusal of the officer's request, it might also have signaled an assent. Rather than proceeding, Officer Hamideh inquired, "No, I can't take it out?" Defendant's clarifying statement, "Oh, okay, take it out," unequivocably and unambiguously demonstrated his intent to cooperate. *Compare State v. Hansen*, 2000 UT App 353, ¶20, 17 P.3d 1135 (finding officer failed to give clear and positive testimony about detainee's response to somewhat ambiguous question about whether detainee would permit a search), *cert. granted*, 26 P.3d 235 (Utah 2001).[5]

5. The absence of deception or trickery on the part of the officer

Officer Hamideh engaged in neither artifice nor deception. Defendant variously argues that the officers' conduct in ordering defendant and Rosillo from the car at gunpoint, telling them that they were considered armed and dangerous, and frisking and then handcuffing them, all following an illegal detention and seizure, was so coercive that defendant's consent could not have been voluntary. Aplt. Br. at 20-21, 23-25. The

---

[5] *But see Bisner*, 2001 UT 99 at ¶ (abrogating voluntariness test set out in *State v. Ham*, 910 P.2d 433, 439 (Utah App. 1996) and applied by this Court in *Hansen*).

argument implies that the officers' reasonable protective actions were a device to induce him to consent to Officer Hamideh's request to view the contents of his pocket. However, under the totality of the circumstances, defendant's excited description loses its vitality.

First, Officer Carter did not use as intense security measures as in a normal felony stop (R. 272:20). Also, Officer Carter, although he drew his sidearm, had "extremely limited" contact with defendant (R. 272:20-21). As noted, Officer Hamideh dealt with defendant, and he did not approach or draw a gun in handling defendant (R. 272:44). *See Bisner*, 2001UT 99 at ¶49 (recognizing that although police officers drew their weapons on the defendant when he exited the house, there was no showing of coercive force against Bisner's mother whom the police approached with their weapons holstered). Further, although defendant was frisked and then handcuffed, those circumstances do not compel a finding that the environment was so coercive that defendant could not have refused consent. In *State v. Thurman*, 846 P.2d 1256 (Utah 1993), the Utah Supreme Court upheld a trial court's determination that the defendant's second consent to search storage units was voluntary even though five hours earlier the police had broken down the door to his home, routed him out of bed naked, told him his refusal to give consent would be useless because a warrant would be obtained in any case, and held him in handcuffs for almost the entire period before he again gave his consent. *Id.* at 1272-73. Similarly, this Court in *Bobo*, concluded that a defendant voluntarily gave police his consent to search his home even though he agreed only after repeated requests to search while detained in his home,

handcuffed, apparently in the company of his guests, and was told that a warrant was being obtained. *Bobo*, 803 P.2d at 1270-71, 1274-75. Other courts have found consents to search voluntary in under similar circumstances. *See United States v. Strache*, 202 F.3d 980, 985 (7th Cir. 2000) (finding consent voluntary despite defendant being accosted by several police officers and placed in custody where no other evidence of coercive police action was presented); *United States v. LaGrone*, 43 F.3d 332, 333-334 (7th Cir. 1994) (finding consent to search store where defendant worked voluntary even though defendant was in custody and police entered store with weapons drawn); *United States v. Murphy*, 16 F. Supp. 2d 397, 401 (S.D.N.Y. 1998) (finding renter's consent to search apartment valid even though renter was in custody, handcuffed, and there were eight police officers in apartment with renter); *People v. Licea*, 918 P.2d 1109, 1113 (Colo 1996) (finding defendant voluntarily consented to search of his car even though he was only eighteen years old, in police custody, was not advised of his constitutional rights, and "chemically messed up" from ingesting drugs).

In sum, based on the totality of the circumstances and in light of the *Whittenback* factors, the trial court correctly concluded that defendant's consent to have Officer Hamideh examine his wallet was voluntary.

Thus, this search was justified as incident to defendant's arrest based on probable cause that he was one of the armed robbers or upon his voluntary consent.

POINT II

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE EYEWITNESS IDENTIFICATION WAS CONSTITUTIONALLY RELIABLE

Defendant argues that the trial court's analysis of the showup was inadequate. Aplt. Br. at 26. He contends that Lund did not have adequate time to view defendant during the robbery and that Lund did not pay close attention to defendant's appearance. Aplt. Br. at 27. Specifically, defendants asserts that Lund could not have been paying close attention to defendant's appearance because Lund described defendant as Hispanic and wearing a dark cap rather than as Caucasian with a red cap. Aplt. Br. at 27. Finally, defendant argues that the show up was unacceptably suggestive because defendant was cuffed and surrounded by police officers and because Lund heard over the police radio that his driver's license was found on defendant's person. Aplt. Br. at 27-28.

A. The eyewitness identification of defendant was constitutionally reliable.

In *State v. Ramirez*, the Utah Supreme Court extended its recognition that eyewitness testimony is potent yet fallible, *see State v. Long*, 721 P.2d 483, 488-91 (Utah 1986), thereby requiring the trial court, in cases where eyewitness identification was central to the case, to undertake "an in-depth appraisal of the identification's reliability," before admitting such testimony under article I, section 7 of the Utah Constitution. *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991). Noting that "[t]he ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable," this Court listed the

following pertinent factors by which reliability must be determined:

> (1) The opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.

Id. at 781 (quoting *Long*, 721 P.2d at 493). The burden is on the State to show that the identification is reliable. *Id.* at 778.

1. Opportunity of Lund to view defendant during the robbery

The first *Ramirez* factor to be considered in assessing an identification for reliability is the witness's opportunity to view the defendant. *Ramirez*, 817 P.2d at 782. This includes examining "the length of time the witness viewed the actor; the distance between the witness and the actor; [and] whether the witness could view the actor's face." *Id.* The quality of light and presence of distractions are also considered under the first factor. *Id.*

Lund had a clear view of the robbers' faces from about five feet away in "pretty good" lighting (R. 272:67). He viewed them at a distance of only five feet (R. 272:66). The robbery took approximately fifteen seconds and during which time Lund was focused on his assailants' faces (R. 272:67-68). There was a light directly over the vacuum where he was working (R. 272:67). Lund had a good enough view of the robbers to be able to see that the robbers were male and appeared to be Hispanics, about 5'10, wearing dark clothing, one

with a gun, and one with a red baseball cap (R. 272:9-10, 66-67, 77-79).

2. Lund's degree of attention to defendant at the time of the event

The second reliability factor examines the witness' degree of attention to the defendant. *Ramirez*, 817 P.2d at 783. This factor looks at whether the witness was "fully aware [of] what was taking place." *Id.* Lund was fully aware of defendant's presence during the robbery and remained focused on the robbers throughout the event (R. 272:66-69).

Defendant's contention that Lund did not pay attention to defendant during the robbery because he described defendant as Hispanic with a dark baseball cap instead of Caucasian with a red baseball cap is unsubstantial. Defendant is not clearly Caucasian and could easily be mistaken for any number of racial or ethnic groups, including Hispanic.[6] A baseball hat may be both red and dark depending on the shade of red, the lighting, and whether the hat was clean or dirty. In any event, defendant's claim rings hollow alongside the specificity of Lund's additional physical descriptions of defendant's height, build, and age, whose accuracy is unchallenged on appeal.

---

[6] Defendant contends that Lund's description of defendant as Hispanic is erroneous. As already mentioned, *see* Aple. Br. at Point I.C.3 n.6, the photograph of defendant in the transcript of the lineup proceedings clearly shows that defendant could easily be mistaken for a Hispanic. *See* State's Exhibit #3, lineup photograph of defendant taken night of offense, included in State's #17. Defendant has dark hair and facial features similar to many Hispanics. At trial, Officer Hamideh, who is Hispanic, said that defendant "had a Hispanic appearance" and that defendant's skin color was that of a Hispanic (R. 274:245-246).

3. Lund's capacity to observe the event including his physical and mental acuity

The third reliability factor focuses on the physical and mental capacities of the witness. *Ramirez*, 817 P.2d at 783. "Here the relevant circumstances include whether the witness's capacity to observe was impaired." *Id.* Possible impairments derive from "stress or fright . . . personal motivations, biases, or prejudices, by uncorrected visual defects, or by fatigue, injury, drugs, or alcohol." *Id.*

Lund's capacity to observe the event was affected only by the fear that normally accompanies being robbed at gunpoint. It is reasonable to assume that Lund experienced some fear, but there is no evidence that Lund was physically assaulted or physically affected in any way by the robbery. His perception was unimpaired by drugs or medication (R. 272:68). Two a.m. was a near the end of his regular work shift and was not an unusual time for him to be awake (R. 272:68). There is no evidence that Lund had any bias or prejudice towards the individuals robbing him, nor is there any evidence that Lund's vision was anything but perfect.

4. Whether Lund's identification was made spontaneously and remained consistent, or whether it was the product of suggestion

The fourth reliability factor assesses the genuineness of the identification. *Ramirez*, 817 P.2d at 783. The circumstances considered involve "the length of time that passed between the witness's observations at the time of the event and the identification of defendant; the witness's mental capacity and state of mind at the time of the identification; the witness's exposure to opinions, descriptions, identifications, or other information from

other sources." *Id.* Other important circumstances include those "instances when the witness or other eyewitnesses gave a description of the actor that is inconsistent with defendant [and] circumstances under which defendant was presented to the witness for identification." *Id.* This factor explores "whether the witness's identification was... the product of suggestion." *Id.* at 784 (quoting *Long*, 721 P.2d at 493).

Lund's identification of defendant was spontaneous. Lund arrived for the show-up only fifteen minutes after the robbery and, before the officer could give him any instructions, Lund immediately identified defendant and Rosillo as the robbers (R. 272:69-71). The squad car in which Lund was riding was parked forty feet from the suspects and the area was "fairly well lit" from overhead lights and police spotlights (R. 272:72). There is no evidence that Lund suffered from any physical or mental impairment at the time of the identification or that he was anything but awake, alert, and capable of identifying those who robbed him.

Lund's identification remained consistent. A few days after the initial show up, Lund positively identified defendant at a line up at the county jail (R. 272:74; State's Exhibit #17). Lund also positively identified defendant at the preliminary hearing, the evidentiary hearing, and at trial (R. 271:4-5, 272:72-73, 273:148).

The suggestiveness of the identification of defendant by Lund did not exceed the level of suggestiveness dismissed by the court in *Ramirez*. In *Ramirez*, the defendant was handcuffed alone to a chainlink fence, surrounded by police officers, and illuminated by the

headlights from several police cars. 817 P.2d at 784. The witnesses had heard remarks by police prior to the show up that officers had apprehended someone who fit the description of the robbers. *Id.* The court recognized that "[t]he blatant suggestiveness of the showup is troublesome" but deferred to "the trial judge's ability to appraise demeanor evidence" and held the identification constitutionally reliable. *Id.* Similarly, in the present case, defendant was handcuffed, surrounded by police, and illuminated by a police spotlight. Thus, the suggestiveness of the showup was no greater than in *Ramirez*.

Defendant argues that the Lund's identification was not spontaneous but was the product of suggestion because Lund heard over the police radio that one of the suspects had Lund's driver's license and credit cards. Aplt. Br. at 27-28. This single fact, considered with the other suggestive circumstances of the show up, is insufficient to overcome the overwhelming evidence in support of reliability. "The ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable." *Ramirez*, 817 P.2d 781. Every other factor considered under the *Ramirez* test weighs in favor of finding reliability. Lund had a clear view of the robbers for a sustained period of time in a well lit area. Lund was not distracted from the robbers but remained focused on them throughout the encounter. Lund was fully awake and unimpaired by drugs or medication, and the identification was made spontaneously within twenty minutes of the robbery and remained consistent thereafter.

5. The nature of the event observed by Lund and the likelihood that he would perceive, remember, and relate it correctly

The last reliability factor concerns the nature of the incident observed and the likelihood of it being perceived and remembered correctly by the witness. *Ramirez*, 817 P.2d at 781. "This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed and whether the race of the actor was the same as the observer's." *Id.* With respect to the routineness of the event, the court in *Long* observed that "people usually remember with some detail and clarity their whereabouts at the time they learned of John F. Kennedy's assassination," but "few of us can remember the color or make of the car that was in front of us at the last traffic signal where we waited for the light to turn green." 721 P.2d at 489.

The robbery is almost certainly galvanized Lund's attention. He testified that the situation was "upsetting," "stressful," and "scary" (R. 272:78). There was no evidence that Lund had ever previously been robbed at gunpoint or that such crimes were commonplace in his neighborhood or line of work. The record contains no evidence of Lund's race.

B. Lund's identification is superior to the eyewitness identification in *Ramirez*.

While the foregoing particularized application of the *Ramirez* factors demonstrates the reliability of Lund's identification, that reliability is even more readily and simply proven by comparing this case with *Ramirez* itself.

In *Ramirez*, the Utah Supreme Court found reliable the identification of a gunman in a nighttime robbery. *Ramirez*, 817 P.2d 884. The eyewitness, all the time under attack

from a pipe wielding accomplice to the offense, identified the masked gunman (the defendant) as he hid behind the corner of a building at a distance variously described as from ten to thirty feet. *Id.* at 776, 782-784. The eyewitness viewed the defendant in time periods variously described as from one second to a minute or longer in lighting variously described as from "good" to "poor." *Id.* at 782-83. Prior to the showup, police officers told the eyewitness that they had apprehended a suspect who matched the description given to them. *Id.* at 784. At the showup conducted in the middle of the night, Ramirez was handcuffed to a chainlink fence and had the headlights from several police cars focused on him. *Id.* Notwithstanding that the case was "extremely close," the *Ramirez* court held that "[c]onsidering the facts in the light most favorable to the trial court's decision and giving due deference to the trial judge's ability to appraise demeanor evidence, we cannot say that [the eyewitness's] testimony is legally insufficient when considered in light of the other circumstances to warrant a preliminary finding of reliability and, therefore, admissibility." *Id.*

By contrast, the circumstances of Lund's identification were far more favorable than those in *Ramirez*. During the robbery, Lund had a clear view of both robbers faces from only five feet away and for at least ten to fifteen seconds (R. 272:67-68). Although it was nighttime, the encounter occurred directly underneath an overhead lamp (R. 272:67). The robbers did not mask or in any other way disguise themselves (R. 272:66-68). Lund was not physically attacked by either robber (R. 272:66-68). At the showup, the circumstances were

similar to those of *Ramirez*. Defendant was handcuffed, though not to a chainlink fence, surrounded by police, and lit up by police car headlights (R. 272:70). However, Lund identified defendant immediately and without hesitation, and his identification remained consistent throughout subsequent line-up, preliminary, evidentiary, and trial proceedings (R. 272:71). *See also State v. Hollen*, 2002 UT 35 (comparing identification with circumstances in *Ramirez* to determine constitutional reliability).

The facts are clear that, in the present case, the identification is in every particular superior to that in *Ramirez*, excepting only Lund's pre-showup knowledge that one of the suspects had his driver's license. (R. 272:80). This one fact, standing alone against the great weight of the evidence favoring reliability, is insufficient to render the identification constitutionally unreliable. *See Ramirez*, 817 P.2d 781 (holding that task of appellate court is to "determine from the totality of the circumstances whether the admission of the identification is consistent with the due process guarantees of article I section 7"). Defendant cites no authority for his claim that Lund's inadvertent discovery that defendant had been found with his driver's license is so suggestive that it negates the overwhelming indicia of an otherwise reliable identification. Indeed, the cases refute defendant's claim. In *State v. Jackson*, 200 S.E.2d 626 (N. C. 1973), the victim, unable to identify her assailant visually, identified the defendant by his voice. *Id.* at 630. Later, it was discovered that the prosecution had informed the victim prior to trial that the defendant's fingerprint had been found in her apartment. *Id.* at 631. Notwithstanding this highly suggestive evidence that

could reasonably have tainted the victim's identification, the reviewing court, based on the record, stated: "We do not believe that the total circumstances surrounding the District Court confrontation established a 'very substantial likelihood of irreparable misidentification." *Id.* Other courts have reached the same conclusion where the witness's discovery of suggestive information was inadvertent, not the product of police impropriety, and the remaining circumstances of the identification otherwise suggested that it was reliable. *See State v. Sims*, 745 So. 2d 151, 158 (La. Ct. App. 1999) ("An immediate and definite identification resulting from an inadvertent meeting between a witness and a suspect will be found reliable and admissible where there is no indication of impropriety or suggestiveness.") (citations omitted), *writ denied*, 762 So. 2d 11 (La. 2000); *Commonwealth v. Drane*, 712 N.E.2d 1162, 1163 (Mass. Ct. App. 1999) (no impermissible suggestiveness where, although witness inadvertently saw the defendant handcuffed in police station prior to identification, identification was spontaneous and found by trial court to be reliable), *rev. denied*, 733 N.E.2d 124 (Mass. 2000).

The trial court, in a privileged position to appraise all the circumstances bearing on the eyewitness identification, including Lund's bearing as a witness, made the following findings and conclusion in denying defendant's motion to suppress:

> Finally, the Court ruled at the conclusion of the evidentiary hearing that the initial show-up and identification of the defendant as one of the two that were involved in the robbery was proper. The Court determined that there was no inappropriate suggestion on the part of the police officers. The victim, Mr. Lund, not only made an immediate positive identification of the defendant and the co-defendant as being the persons who robbed him a few

> moments before at the Ute Car Wash on 300 East and 300 South, but has remained consistent in that identification through various court hearings and a line-up after the defendant's arrest.

(R. 160-61). Based on the totality of the circumstances, the trial court correctly found that the Lund's eyewitness identification was reliable. *See Ramirez*, 817 P.2d at 784 (directing review of "the facts in the light most favorable to the trial court's decision [while]giving due deference to the trial judge's ability to appraise demeanor evidence").

CONCLUSION

Based on the above discussion, the state respectfully requests that defendant's conviction be affirmed.

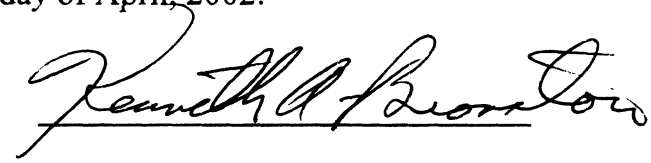
RESPECTFULLY SUBMITTED this 10th day of April, 2002

MARK L. SHURTLEFF
Attorney General

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Richard P. Mauro, attorney for defendant, 43 East 400 South, Salt Lake City, Utah 84111, this 10th day of April, 2002.



ADDENDA

ADDENDUM A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 001914668
vs.	:	
ANDREW OWENS MALLERY,	:	
Defendant.	:	

The above-referenced matter was before the Court on April 9, 2001, at 9:00 a.m. Counsel for the State and the defendant were present, and the defendant was present. The Court took evidence regarding the matters raised in the defendant's Motion to Suppress Personal and Residential Search, as well as initial identification of the defendant. Following the taking of evidence, the Court heard closing arguments of counsel and ruled on a number of the issues raised in the defendant's Motion, and took certain portions of the Motion under advisement. The Court has reviewed the evidence, the arguments of counsel and the written submissions, and being fully advised, enters the following Minute Entry decision.

The Court determined that the search of the residence at 228 South 300 East was with permission of the occupant, and that there was no constitutional infirmity with regard to that search. During that search, the victim's wallet and a firearm that matched the

description of the firearm used in the armed robbery were located. The Court therefore denied the defendant's Motion to Suppress the evidence obtained during the search of the residence.

The Court further determined that the search of the defendant's person, assuming the detention was otherwise appropriate, at the scene of the location where the police officers stopped the cab in which the defendant and co-defendant were riding, was with the defendant's consent.

Further, the Court ruled that the initial stop of the cab in which the defendant and the co-defendant were riding was appropriate. The Court determined that the officers had at least an articulable suspicion regarding the occupants of the cab as being involved in the robbery which they were investigating.

Finally, the Court ruled at the conclusion of the evidentiary hearing that the initial show-up and identification of the defendant as one of the two that were involved in the robbery where Mr. Lund was the victim was proper. The Court determined that there was no inappropriate suggestion on the part of the police officers. The victim, Mr. Lund, not only made an immediate positive identification of the defendant and the co-defendant as being the persons who robbed him a few moments before at the Ute Car Wash on 300 East and 300 South, but has remained consistent in that identification through various court hearings and a line-up

after the defendant's arrest. Accordingly, the defendant's Motion to Suppress the initial identification of him by the victim at the scene of the stop is denied.

After considering the position of the parties, the Court is satisfied that the detention and the manner of detention, including the length of detention of the defendant after the initial stop, was proper. The Court determines that not only did the officers have a reasonable, articulable suspicion to make the initial stop, but after the defendant was out of the cab, the police not only had a continued articulable suspicion, but had additional facts to constitute probable cause so as to believe that the defendant was involved in the robbery at the Ute Car Wash a few minutes before.

The defendant Mallery was found wearing a baseball cap as was reported to the police officers. The defendant matched the build and height given as identification of the perpetrators of the robbery, and the defendant came from the immediate area of the robbery in the cab just a few minutes after the robbery occurred. The age of both the defendant and the co-defendant Rosillo matched the description given by the victim, Mr. Lund. In addition to all the foregoing that created probable cause for the officers to believe that the defendant had been involved in a robbery a few minutes before at the Ute Car Wash, there was additional information after the defendant voluntarily agreed to have his

person searched by the police officer, where identification and other documents relating to the victim, Mr. Lund, were located. Those documents found in the voluntary search of the defendant's person serve to increase the quantity of information available to the police officers to create additional probable cause regarding the defendant Mallery.

The nature of the detention was reasonable to effect the purpose of the stop and, taking into account the nature of the crime being investigated, the manner of the detention was appropriate as well. The officers detained the defendant and co-suspect, Rosillo, near the location of the stop to see if they could be identified by the victim, and such a procedure is proper. The victim was close and the detention would be of short duration. The fact that the defendant was handcuffed while being detained by the police officers, while not usually called for, is appropriate under the circumstances where a crime being investigated was a crime involving the use of a firearm.

Accordingly, the defendant's complaint that he was improperly detained after the initial stop in an unreasonable manner for an unreasonable length of time, so as to void the initial identification or void the voluntary search of the defendant's person, are without substance and as previously indicated, denied.

The Court will expect counsel for the State to prepare detailed Findings of Fact and Conclusions of Law, and an Order denying the defendant's Motion addressed not only at the conclusion of the evidentiary hearing on April 9, 2001, but also as set forth in this Minute Entry decision.

Dated this 13 day of April, 2001.

TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 13 day of April, 2001:

Byron F. Burmester
Deputy District Attorney
Attorney for Plaintiff
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

Richard P. Mauro
Attorney for Defendant
43 East 400 South
Salt Lake City, Utah 84111

E Thompson